States[2] that to hold otherwise would deny the accused an effective representation by counsel at the only stage when legal aid and advice would help him.

In Canada the right of the suspect to counsel conferred by the Canadian Bill of Rights is respected but it is of limited scope. It relates to the trial itself and not to any proceedings prior to it: see *R.* v. *Connor.*[3]

English law does not go so far in restricting the right to counsel. There, its importance in the particular context of police interrogation has been given explicit judicial recognition in the Judges' Rules that "any person at any stage of an investigation ... even if he is in custody ... should be able to communicate and to consult privately with a solicitor." This principle is subject to the proviso that no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice. But the Judges' Rules lack all force of law so that it will not be unlawful on the part of the police to ignore them. In those circumstances the only course open to the arrested person is to complain to the police themselves under the Police Act 1964.

As in Canada we have a Bill of Rights. However the position in this country seems to be that the pretrial right of an arrested person to be allowed to consult a lawyer is merely one particular manifestation of the general right to be allowed to consult and be defended by a legal practitioner of his choice. (Art. 5(3) of the Constitution). Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice: see *Ooi Ah Phua* v. *Officer-in-Charge Criminal Investigation, Kedah/Perlis.*[4] The position seems to be the same in India: see *Moti Bai* v. *The State.*[5]. We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under section 117 C.P.C. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period of police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

The correct view is that as stated by this court in *Ooi Ah Phua's, supra,* case. In spite of the magistrate's order under section 117 C.P.C. the right of the arrested person to counsel is not lost. Such order is essential only on the basis that it renders legal detention which otherwise would have been illegal in view of the provision of clause 4 of Art. 5 of the Constitution which exhorts that an arrested person if not released shall be produced before a magistrate within twenty-four hours and shall not be further detained in custody without the magistrate's authority. The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administration of justice falls on the police.

On the facts of this case we were satisfied that they had given good and sufficient reason why such right could only be exercised after the period of police investigation was completed under section 117 C.P.C. The fact that the appellant was released five days earlier showed the *bona fides* of the police, which means that the right to counsel could be exercised much earlier than that originally allowed.

We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State. We have a shocking prevalence of crime, and of crimes of violence, infractions of the plainest requirements of civilised society about which there is no debate. Our capacity to protect life and property itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws an appropriate punishment of crimes, the deterrent effects which are in large part the object of these laws. This failure is due in part to the defects in a procedure which favours delay and obstructions to the cause of justice. The chief cause is probably a laxity of public sentiment, the most difficult thing to correct.

Order accordingly.

Solicitors: *Karpal Singh, Wong & Co.*

CHEW ONN YUEN & ANOR. v. PUBLIC PROSECUTOR

[A.Cr.J. (Ajaib Singh J.) October 16, 1975]
[Seremban — Criminal Appeal No. 3 of 1973]

Copyright — Exposure by way of trade — Sale of pirate gramophone records — Whether infringement of copyright — Charge under s. 15(1)(b) of the Copyright Act, 1969 — Appeal against conviction — Copyright Act, 1969, ss. 4(1) & (2), 5(1), 13 & 15(1)(b) — National Registrations Regulations, 1960, reg. 5.

The complainants, E.M.I. (Malaysia) Sdn. Bhd., owned copyright in a number of Malay songs which they had bought from the composers after entering into formal agreements with them. They had sent out notices at various intervals to record dealers including the appellants warning them of copyright infringements in respect of their gramophone records but the appellants had shown no intention of paying any heed to these warnings.

A report was lodged with the police and on November 13, 1971, the complainants' Managing Director, Tanner, accompanied two police officers to the appellant's shop where the police seized 110 records. Earlier on, on the same day, another police officer had bought 3 records from the appellants' shop. These records were found not to be the complainants' records and that they were inferior quality records. This was testified by one Mrs. Beh to whom Tanner had given some of his powers and duties including the power to buy and sell copyright without restriction.

The appellants were found guilty of two charges under section 15(1)(b) of the Copyright Act 1969. The first charge was that the appellants had by way of trade exposed 105 infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sdn. Bhd. and the second charge was that the appellants sold three infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sendirian Berhad.

Held, dismissing the appeal: (1) copyright in a work may subsist only by virtue of the Copyright Act so that before proving that the appellants had sold or by way of trade exposed the infringing copies of the musical works contained in the gramophone records the prosecution had first of all to prove that the musical works were eligible for copyright within the meaning of section 4 of the Act and under section 5(1) that the authors of the musical works were citizens of or permanent residents in Malaysia at the time when they made the musical works;

(2) all the ingredients in the charges had been proved, and there was no reason to interfere with the magistrate's decision.

CRIMINAL APPEAL.

James Ponniah for the appellants.

V.T. Nathan for the Public Prosecutor (respondent).

Ajaib Singh J.: This was an appeal from the decision of the learned magistrate who had convicted the appellants on two charges under section 15(1)(b) of the Copyright Act, 1969. The first charge was that the appellants had by way of trade exposed 105 infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sendirian Berhad and the second charge was that the appellants sold three infringing copies of musical works contained in gramophone records for which copyright then subsisted in favour of E.M.I. (Malaysia) Sendirian Berhad.

The facts of the prosecution case briefly were that on November 13, 1971 Inspector Halim went to the appellants' shop known as Yik Seng Book & Record Company and purchased three Malay gramophone records for $5.40 and on his return to the police station he handed them to Chief Inspector Rozario. Thereafter both Inspector Halim and Chief Inspector Rozario accompanied by two officials from E.M.I. (Malaysia) Sendirian Berhad went back to the appellants' shop and took possession of 110 records which were displayed on shelves and boxes. The appellants who were partners of the shop were present when the police took possession of these records. Mr. Anthony Arnold Tanner the general manager and director of E.M.I. (Malaysia) Sendirian Berhad said in his evidence that his company owned copyright in a number of Malay songs which the company had bought from the composers after entering into formal agreements with them and he produced 20 agreements signed by the composers. Mrs. Beh Suat Pheng the records marketing manager of the company had signed those agreements on behalf of the company. Mr. Tanner said that the company sent out notices at various intervals to record dealers including Yik Seng Book & Record Company of which the appellants were partners warning them of copyright infringements in respect of their gramophone records but the appellants had shown no intention of paying any heed to these warnings. He then lodged a report with the police. On November 13, 1971 he accompanied Chief Inspector Rozario and Inspector Halim to the appellants' shop when the police took possession of 110 records. He said that all these records and the three bought by Inspector Halim earlier that day were not his company's records and that they were inferior quality pirate records. As managing director Mr. Tanner had delegated some of his powers and duties to Mrs. Beh Suat Pheng including the power to buy and sell copyright without restriction. The company had never assigned any of the copyright to anyone in respect of these records.

Mrs. Beh Guat Pheng said that she had been with E.M.I. (Malaysia) Sendirian Berhad since its inception in 1968 and before that she was associated with E.M.I. Electronics Limited from 1964 which was one of the E.M.I. group with headquarters in London. She was familiar with the copyright of the company and particularly familiar with Malay songs published by the company. Whenever the company acquired copyright from composers she would enter into an agreement and sign on behalf of the company. On November 13, 1971 she identified all the records bought and seized by the police as of inferior quality not manufactured by the E.M.I. and they did not carry the company's trade mark. She had listened to these records and had compared them with her company's records. Mrs. Beh Suat Pheng said further that all the records seized and bought by the police from the appellants' shop contained musical works the copyright of which had been assigned to the company by the composers and she gave details of the songs recorded therein. The records seized and bought from the appellants' shop included some songs the copyright of which did not belong to E.M.I. (Malaysia) Sendirian Berhad. In the 110 records seized by the police the company had copyright in 105 songs and in the three records bought by the police the company had copyright in three songs. Mrs. Beh Suat Pheng also produced the records actually manufactured by E.M.I. (Malaysia) Sendirian Berhad which related to the copyright songs contained in the records which came from the appellants' shop. She said that the company did not buy copyright of Malay songs composed by non-citizens. In explaining how she procured the musical works Mrs. Beh Suat Pheng said that the composer would send to the company the music or song usually on a written scroll and in most cases in music sheet with notes. The company had qualified musicians to read these scrolls. She would then send the scrolls to the producer who would arrange the music and decide upon the instruments and the lyrics to be used. The music sheets were kept by the company and the titles were given either by the composer or the lyric writer.

An officer from the Registration Department gave evidence to the effect that all except two of the twenty persons named in the agreements for the assignment of copyright were citizens by operation of law. The two exceptions were also citizens — one by naturalisation and the other by registration. This witness produced the original citizenship particulars of these two persons and certified copies of the counterfoils of the national registration identity cards of the remaining eighteen persons. According to his records the registration officer said that all the twenty persons were still citizens of Malaysia.

Mrs. Beh Suat Pheng had said in her evidence that the company was not able to contact the composers of the songs but the prosecution did call one of the twenty persons who had assigned the copyright to E.M.I. (Malaysia) Sendirian Berhad. He was none other than the famous Malaysian singer the late P.

Ramlee. In his evidence he said that he was a film actor and director and of Malaysian citizenship. He had composed three songs and had assigned them to E.M.I. (Malaysia) Sendirian Berhad by executing two agreements. These songs were among those included in the seized records. In cross-examination P. Ramlee said that all the songs were written by himself and he received royalties in return depending on the sales and he had not given copyright of those songs to anyone else other than to E.M.I. (Malaysia) Sendirian Berhad.

At the close of the case for the prosecution the learned magistrate ruled that the prosecution had made out a *prima facie* case and called for the defence. Both the appellants elected to remain silent whereupon they were each found guilty, convicted and sentenced to pay a fine of $2,000 each on the first charge and $200 each on the second charge. The records were ordered to be released to E.M.I. (Malaysia) Sendirian Berhad for destruction.

Mr. James Ponniah for the appellants submitted that the learned magistrate erred in law in accepting the counterfoils of the national registration identity cards as sufficient evidence in support of the prosecution case that the composers were citizens or permanent residents of Malaysia. Secondly, that the 20 agreements signed by the various composers were wrongly accepted by the learned magistrate because they were signed on behalf of the company by Mrs. Beh Suat Pheng when the articles of association of the company did not authorise her to do so. As such there were no valid agreements signed by the company. Thirdly, that the learned magistrate erred in law in accepting secondary evidence of the musical works alleged to be infringed and that the gramophone records being copies made from one common original evidence of the contents of the original musical scrolls should have been produced. Lastly, it was contended that the learned magistrate erred in holding that the said records had infringed the copyright of the musical works assigned to E.M.I. (Malaysia) Sendirian Berhad when there was no qualified independent expert witness to testify as to the alleged infringement. Mrs. Beh Suat Pheng was an interested party employed by the company and her evidence that the appellants' records were infringements of copyright should not be accepted.

Under section 15(1)(b) of the Copyright Act, 1969 any person who sells, lets for hire or by way of trade exposes or offers for sale or hire any infringing copy of a work when copyright subsists in it shall unless he proves that he acted in good faith and had no reasonable grounds for supposing that copyright would or might be thereby infringed be guilty of an offence and upon conviction shall be liable to a fine or imprisonment as prescribed therein. Copyright in a work may subsist only by virtue of the Copyright Act so that before proving that the appellants had sold or by way of trade exposed the infringing copies of the musical works contained in the gramophone records the prosecution had first of all to prove that the musical works were eligible for copyright within the meaning of section 4 of the Act and secondly under section 5(1) that the authors of the musical works were citizens of or permanent residents in Malaysia at the time when they made the musical works. Sections 4 and 5(1) of the Copyright Act read as follows: —

"4.(1) Subject to the provisions of this section the following works shall be eligible for copyright —

(a) literary works;

(b) musical works;

(c) artistic works;

(d) cinematograph films;

(e) sound recordings;

(f) broadcasts.

(2) A literary, musical or artistic work shall not be eligible for copyright unless —

(a) sufficient effort has been expended on making the work to give it an original character; and

(b) the work has been written down, recorded or otherwise reduced to material form.

(3) A work shall not be ineligible for copyright by reason only that the making of the work, or the doing of any act in relation to the work, involved an infringement of copyright in some other work.

5.(1) Copyright shall be conferred by this section on every work eligible for copyright of which the author or, in the case of a work of joint authorship, any of the authors is, at the time when the work is made, a qualified person, that is to say —

(a) an individual who is a citizen of, or is a permanent resident in, Malaysia; or

(b) a body corporate constituted and vested with legal personality under the laws of Malaysia and established in Malaysia."

On the evidence before him the learned magistrate had rightly convicted the appellants on the two charges as preferred against them and I found no reason for interfering with his decision. All the ingredients in the charges had been proved. Under the Copyright Act musical work means any musical work irrespective of musical quality including works composed for musical accompaniment. The composers in the musical works had assigned the copyright in their respective musical compositions to the E.M.I. (Malaysia) Sendirian Berhad. In one of the clauses in the 20 agreements which were of standard type the composers had guaranteed that their musical compositions were their original works, that they were the owners of the copyright therein, that they had not granted, transferred or assigned any interest in the copyright which they were now assigning to the E.M.I. (Malaysia) Sendirian Berhad to any other person and that their compositions had not been published with their consent or acquiescence. It was thus proved that these musical works were eligible for copyright as sufficient effort had been expended on making the works to give them an original character and that the works had been written down and reduced to material form. There was also sufficient evidence that the authors of the musical works were citizens of Malaysia at the time when the works were made. Regulation 5 of the National Registration Regulations 1960 provides for the issue of blue bordered identity cards with blue printing to citizens of Malaysia and the registration officer who gave evidence in this case had produced certified copies of the counterfoils of these cards in respect of eighteen of the authors who were citizens by operation of law. He also produced the original citizenship particulars of the two remaining persons

who were citizens by naturalisation and registration and according to the records kept in the Registration Department all the twenty persons were still citizens of Malaysia. The authors had the initial copyright in the musical works and they had lawfully assigned the copyright to E.M.I. (Malaysia) Sendirian Berhad under section 13 of the Copyright Act which states that copyright shall be transmissible by assignment, by testamentary disposition or by operation of law as movable property. After their assignment therefore the copyright in the musical works subsisted in favour of E.M.I. (Malaysia) Sendirian Berhad. As for the submission that the agreements were signed on behalf of the company by Mrs. Beh Suat Pheng when the articles of association of the company did not authorise her to do so I need only say that no such authorisation by the articles of association was necessary to empower her to sign the agreements on behalf of the company. Mrs. Beh Suat Pheng had been authorised by the managing director of the company to buy and sell copyright without restriction and she had also been delegated with some of the powers and duties of the managing director. As such she was perfectly entitled to sign the agreements on behalf of the company and her doing so could in no way render the agreements invalid. It was also contended that the original scrolls which the authors had composed should have been produced before it could be said that there had been any infringement. With respect I found no substance in this contention. The prosecution had produced the relevant records made by E.M.I. (Malaysia) Sendirian Berhad. It was not the musical scrolls but the musical works contained in those genuine records that were the original musical works the copyright of which had been infringed by the inferior quality pirate records. With regard to the evidence of Mrs. Beh Suat Pheng as to the infringement of copyright in the musical works the fact that she was an employee of the company was not a valid reason by itself for disregarding her evidence. She was an official of the company dealing particularly with copyright of Malay songs and as such she was in a good position to testify as to the genuineness or otherwise of her company's records. In the absence of any valid ground for discrediting her evidence the learned magistrate was quite right in accepting her evidence in respect of the infringement of the copyright.

The appeal was accordingly dismissed.

Appeal dismissed.

Solicitors: *Stanley Ponniah, Ng & Soo.*

ABU HASSAN BIN ALI v. LEE PENG KONG

[O.C.J. (Abdul Hamid J.) February 23, 1977]
[Kuala Lumpur — Civil Suit No. 2138 of 1975]

Damages — Personal injuries — Loss of sexual function — Partial amputation of the penis — Multiple abrasions — Element of overlapping.

The plaintiff claimed damages for injuries he received in a motor vehicle accident in 1975. The defendant admitted liability. The first medical report revealed the following injuries:—

(1) Multiple abrasions over the (R) cheek, forehead, chest, abdomen, both thighs, parietal region, (L) elbow, both knees.

(2) Laceration over scrotum and perineum. (R) testis completely avulsed. (L) testis exposed cut, (R) spermatic cord avulsed. (L) spermatic cord vessels partially severed but cord intact.

(3) Partial amputation of the penis.

In a subsequent medical report on the plaintiff in 1976 the physician said "before this accident, he is said to have had satisfactory sexual intercourse. After the accident, he says he has occasional nocturnal ejaculation. He also has painful erection. On examination general condition good; mental state satisfactory; abdomen scar tissue seen in the epigastrium as well as the hypogastrium.... Further scar tissue also seen on the left inguinal region and the right side in the anterior aspect. *Examination of genitalia:* The pubic hair distribution is seen to be normal. The size of the penis is average. The right scrotum is missing,... (there are) scars left by removal of the right scrotum and testis.... However the testis is atrophic and measures about 2 cm by 1 cm. (There is) a scar on the torso aspect of the penis and the trunk of the penis. This scar measures 2 cm by ½ cm and is indicated by a yellow indicator. It is slightly tender. The patient was sent for semen analysis. Unfortunately, he was unable to produce a specimen at this occasion...." He then concluded as follows:—

"(1) It is very unlikely that this patient is able to father a child because the remaining testis is atrophied probably due to a result of damage to the blood supply to the testis.

(2) Technically, this patient should be able to have sexual intercourse. However one has to take into account the psychological and emotional aspect of this question and I am unable to draw any firm conclusion apart from saying that there should be no technical difficulty in having sexual intercourse.

(3) The penis is intact. There was a partial amputation during the accident but this has been effectively resatured.

It is noted that this examination and medical report does not include a psychiatric assessment nor does it include an orthopaedic assessment."

There was further supplementary medical report in 1977. After careful examination of the medical reports,

Held: (1) the court should have regard to the following: (a) the multiple abrasions and lacerations in various parts of the body; (b) the partial amputation of the penis; (c) the fact that the plaintiff is now sterile and therefore unable to father a child; (d) the likelihood that the enjoyment of the plaintiff's sexual intercourse will be affected by psychological and emotional effect; (e) the pain in the penile scar during sexual intercourse; (f) the ugly scars on various parts of the body and (g) the occasional pain in the penile scar when not performing sexual act, backache and itchiness of the scar on the abdomen. In its final assessment the court should however bear in mind the element of overlapping;

(2) in a case such as this it is impossible to accurately assess the extent of pain and suffering and for that matter to express with certainty that the injuries received by a claimant in one case can precisely be compared with the injuries received in another;

(3) taking into account the overall picture judged in the light of *Chua Kim Liang's* case,[3] a sum of $27,500 would provide a fair and reasonable compensation.